

### **REMARKS**

Applicant cancelled claims 182, 193-196, 201, 207, 208, 210-212, 215-256, 258-276, 278-318, and 320-350 without prejudice or disclaimer of their subject matter, amended claims 172-175, 181, 183, 184, 190-192, 197, and 202, and added new claims 351-359 to further define Applicant's claimed invention. Support for the amendment to independent claim 172 may be found in the specification at least on page 49, lines 13-33 and Fig. 7F. Support for new claims 351-358 may be found in the specification at least on page 28, line 9 to page 29, line 30; page 40, line 33 to page 42, line 5; and Figs. 11B and 11D.

In the Office Action, the Examiner rejected claims 172-176, 178-184, 201, 202, 247, 331, and 344-346 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 4,878,915 to Brantigan ("Brantigan") in view of U.S. Patent No. 5,108,395 to Laurain ("Laurain"), and U.S. Patent No. 5,049,150 to Cozad ("Cozad").

Independent claim 172, as now amended, recites a guard having "two passages for providing guided access to a disc space and a vertebral body adjacent the disc space," and a distracting element and orientation pin where the orientation pin has "a distal end portion configured to extend parallel to and along a majority of the length of said distracting element when said distracting element and said orientation pin are inserted into the spine." None of Brantigan, Laurain and Cozad, whether alone or in proper combination, disclose or suggest a guard having two passages for providing protected access to the disc space and a vertebral body adjacent the disc space as recited in independent claim 172. Moreover, none of Brantigan, Laurain and Cozad, whether alone or in proper combination, disclose or suggest a guard having an orientation pin with a distal end portion configured to have a length that extends along a majority of the length of the distracting element when the distracting element and orientation pin are inserted into the spine as recited in independent claim 172. Accordingly, Applicant submits that the Examiner's rejection of claims 172-176, 178-184, 201, 202, 247, 331, and 344-346 under 35 U.S.C. § 103(a) as being unpatentable over Brantigan in view of Laurain and Cozad has been overcome.

Applicant submits that the Examiner's remaining rejections have been addressed either by the amendment to independent claim 172, which Applicant submits is allowable over the cited art, or by the cancellation of the rejected claims, rendering those rejections moot.

Applicant submits that independent claims 172 and 351 are patentable and that dependent 173-176, 178-181, 183-192, 197-200, 202-206, and 352-359 dependent from one of independent claims 172 and 351, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

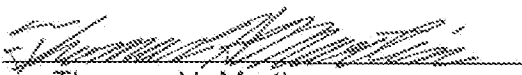
In view of the foregoing remarks, Applicant submits that the claimed invention, as amended, is neither anticipated nor rendered obvious in view of the prior art references cited against this application. Applicant therefore requests the entry of this Amendment, the Examiner's reconsideration and reexamination of the application, and the timely allowance of the pending claims.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: November 1, 2010

By:   
Thomas H. Martin  
Registration No. 34,383

1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (330) 877-0700  
Facsimile: (330) 877-2030